



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2005

Ms. Lydia L. Perry
Law Offices of Robert E. Luna, PC
4411 North Central Expressway
Dallas, Texas 75205

OR2005-04502

Dear Ms. Perry:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224858.

The Lewisville Independent School District (the "district"), which you represent, received a request for all information regarding a named individual and the Colony High School ROTC/orienteering program. You claim that the requested information is excepted from disclosure pursuant to sections 552.101, 552.102, 552.114, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information other statutes make confidential. You submitted to this office an Employment Eligibility Verification I-9 Form. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this instance, release of the Form I-9 would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the Form I-9 in Exhibit D is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You also raise section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” *See generally* Open Records Decision No. 643 (1996). This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.*

Based on the reasoning set out in Open Records Decision No. 643, we conclude that the documents in Exhibit F are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101, the district must withhold these documents. However, we find that the information in Exhibit G that you seek to withhold on this basis relates to an allegation of misconduct on the part of a district employee and is not an evaluation as that term is commonly understood. Thus, we find that section 21.355 is inapplicable to the submitted information in Exhibit G and it may not be withheld under section 552.101.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Prior decisions of this office have found that personal financial information not related to a financial transaction between an individual and a governmental body is generally protected by common law privacy. *See* Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, are protected under common law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). Upon review, we agree that the district must withhold the information in Exhibit E and the information we have marked in Exhibit B pursuant to section 552.101 of the Government Code in conjunction with common law privacy.

Section 552.102(b) excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee.” Gov’t Code § 552.102(b). This section further provides, however, that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from

disclosure. Therefore, except for the information that reveals the degree obtained and the courses taken, the district must withhold the college transcripts in Exhibit C under section 552.102(b).

You claim that a portion of the information in Exhibit G is subject to section 552.114 of the Government Code, which excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Gov't Code § 552.114. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). A "student" is defined to include "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information," but does not include a person who has not been in attendance at such agency or institution. *Id.* § 1232g(a)(6); *see also* 34 C.F.R. § 99.3. Section 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Act in accordance with FERPA.

In Open Records Decision No.634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. However, in this instance, you have asked us to rule on the applicability of section 552.114 and FERPA. Upon review of Exhibit G, we find that the information does not relate to a student of the district. Therefore, none of the information in Exhibit G is confidential under FERPA, and the district may not withhold this information under section 552.101 on that ground.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Therefore,

the district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the district's receipt of this request for information. The district may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election for confidentiality under section 552.024.

The information in Exhibit B contains personal information of two district employees. Among the submitted documents is a copy of the form in which one employee timely elected to keep his home address and home phone number confidential prior to the date on which the district received this request. Accordingly, you must withhold the home address and phone numbers we have marked under section 552.117(a)(1) of the Government Code for this employee. We note, however, that the submitted election form does not encompass this employee's social security number and family member information. Accordingly, the district may not withhold this employee's social security number or family member information under section 552.117. If the other employee whose information is at issue timely elected to withhold his social security number, then this information must be withheld under section 552.117. The department may not withhold this social security number under section 552.117(a)(1) if the employee did not make a timely election to keep his information confidential.

Social security numbers that are not excepted from disclosure under section 552.117 may be confidential under federal law. A social security number must be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

Finally, a portion of the remaining submitted information in Exhibit B is subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). The Texas driver's license number that you have marked must be withheld under section 552.130.

In summary: (1) the district must withhold the Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; (2)

the evaluations in Exhibit F must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code; (3) Exhibit E and the information we have marked in Exhibit B must be withheld under section 552.101 in conjunction with common law privacy; (4) except for the information that reveals the degree obtained and the courses taken, the college transcripts must be withheld under section 552.102(b); (5) the marked home addresses and telephone numbers are excepted from disclosure under section 552.117(a)(1); (6) the marked social security number must be withheld under section 552.117(a)(1) if that section applies; (7) social security numbers may be confidential under federal law; and (5) the district must withhold the Texas driver's license number you have marked pursuant to section 552.130. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/krl

Ref: ID# 224858

Enc. Submitted documents

c: Ms. Crystal Forester
Lewisville/Flower Mound Leader
P. O. Box 308
Lewisville, Texas 75067
(w/o enclosures)